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FINDING A “CURE”: HOW MUCH INTEREST IS ENOUGH FOR A CHAPTER 11 CURE?

ABSTRACT

Default-rate interest can quickly and easily amount to millions of dollars. In a chapter 11 bankruptcy proceeding, default-rate interest can jeopardize a plan’s chances at confirmation. As one commentator described, “[i]n a bankruptcy case, interest is the tail of the dog, but it is a long tail and it wags a lot.”¹ Default-rate interest—interest triggered by breach of a contractual obligation—implicates both a determination of claim’s status and the claim’s ultimate confirmation. In August 2015, a panel of judges on the Eleventh Circuit ruled on the matter, creating a circuit split for a brief time until a Ninth Circuit panel addressed the question in 2016. Last year, the Ninth Circuit eliminated the split. While the Eleventh Circuit three-judge panel was unanimous, the Ninth Circuit decision split two-to-one, with a fiery dissent. The Ninth Circuit decision also reversed a previous decision by another panel. All circuits agree the plain language of the Bankruptcy Reform Act of 1994, an amendment Congress added in 1994 to overrule a Supreme Court case, allows for collection of default interest. The circuits previously disagreed, however, whether Congress intended a requirement for “cure” to be payment of interest at the default rate. This Comment explains why both panels are incorrect.

¹ Dean Pawlowic, *Entitlement to Interest Under the Bankruptcy Code*, 12 BANKR. DEV. J. 149, 150 (1995).

INTRODUCTION

An August 2015 decision by the Eleventh Circuit briefly created a circuit split on an issue of importance to many debtors in chapter 11 bankruptcy.² The split concerns whether, under § 1123 of the Bankruptcy Code (“Code”), a debtor who has defaulted on a loan must pay interest at the contractual default rate to cure the default.³ The Eleventh Circuit ultimately held in the affirmative and ruled for the creditors, joining several other circuits.⁴ In contrast, federal courts within the Ninth Circuit, most notable among them the Bankruptcy Appellate Panel for the Ninth Circuit, had, until November 2016, continued to construe the statute consistent with their previous holdings issued before the Bankruptcy Reform Act of 1994.⁵ The Ninth Circuit’s recent decision resolved the split but did not assuage concerns that the holding of both courts is incorrect. Disputes and disagreements regarding statutory construction, the importance (or lack thereof) of congressional intent, and general Code interpretation are at the core of this issue.

This Comment will argue the Eleventh Circuit’s interpretation frustrates Congress’s pro-debtor amendment and creates unnecessary tension within the Code. While the Ninth Circuit joined the Eleventh Circuit in demanding default-rate interest to satisfy a cure, a judge on the panel dissented. Her dissent offers a cogent explanation for the majority’s error.

First, this Comment will explore the broader purpose of chapter 11 bankruptcy and fully explain the two most relevant statutory provisions. Following the introduction, this Comment will proceed in three parts by (1) detailing the recent Eleventh and Ninth Circuit cases; (2) surveying jurisprudence both before and after the seminal Code amendments in 1994; and

² JPMCC 2006-LDP7 Miami Beach Lodging, LLC v. Sagamore Partners, Ltd. (*In re Sagamore Partners, Ltd.*), 610 F. App’x 922, 930 (11th Cir. 2015).

³ *Id.*

⁴ *Id.*; see *Southland Corp. v. Toronto-Dominion* (*In re Southland Corp.*), 160 F.3d 1054, 1059–60 (5th Cir. 1998).

⁵ See *Great W. Bank & Trust v. Entz-White Lumber & Supply, Inc.* (*In re Entz-White Lumber & Supply, Inc.*), 850 F.2d 1338, 1340 (9th Cir. 1988) (holding that debtor could cure debt that naturally matured prepetition by paying arrearages at predefault rate of interest); *In re Udhus*, 218 B.R. 513, 518 (9th Cir. BAP 1998); *In re Phoenix Bus. Park Ltd. P’ship*, 257 B.R. 517 (Bankr. D. Ariz. 2001); *In re Zamani*, 390 B.R. 680 (Bankr. N.D. Cal. 2008). *But see In re Moody Nat’l SHS Houston H, LLC*, 426 B.R. 667, 676 (Bankr. S.D.Tex. 2010) (disagreeing with the Ninth Circuit and holding that, due to § 1123(d)—which provides that the amount necessary to cure a default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law—the plan must provide for payment of default interest); *In re Sweet*, 369 B.R. 644 (Bankr. D. Col. 2007) (disagreeing with the Ninth Circuit and holding that, where the default interest rate was not considered a penalty, default interest was appropriate to effectuate a § 1124(2)(A) cure).

(3) exploring Congress’s motivation for enacting the Bankruptcy Reform Act of 1994. Next, this Comment will discuss and analyze the differing approaches taken by the circuit courts. Finally, a proposed hybrid approach—as well as a call for Congress to clarify its intent—will be offered.

A. Purpose of Chapter 11 Bankruptcy

As the Eleventh Circuit has stated, the “ultimate goal of Chapter 11 is to marshall [sic] [] resources to provide the best possible opportunity for a successful rehabilitation which will ultimately redound to the benefit of all creditors.”⁶ One of the primary benefits of a chapter 11 bankruptcy is permitting a business to continue operations so as to not disrupt the economic fabric of the community.⁷ Indeed, protecting the business and ensuring its continued operation and survival is in the best interest of both the creditor(s) and the public generally.⁸ Not only does protecting the business ensure its viability, but it also increases the likelihood of creditors receiving more on debts owed. To effectuate that goal, obtaining confirmation of a reorganization plan is imperative,⁹ and the Code delegates “broad equitable powers” to courts “to balance the interests of the affected parties” to successfully confirm a reorganization plan.¹⁰

Figure 1, below, displays the various Code provisions and their applicability and importance to understanding the circuit split. The following

⁶ *Varsity Carpet Servs. v. Richardson (In re Colortex Indus.)*, 19 F.3d 1371, 1377 (11th Cir. 1994). *But cf. In re Moody Nat.*, 426 B.R. at 675 (citing *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008)) (“At its most fundamental level, a business bankruptcy case is designed to maximize the returns to creditors holding claims against the estate, while allowing a debtor to reorganize.”).

⁷ 7 COLLIER ON BANKRUPTCY ¶ 1100.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (stating that “continued operation can save the jobs of employees, the tax base of communities, and generally reduce the upheaval that can result from termination of a business”).

⁸ CHRISTOPHER S. STRICKLAND & W. HOMER DRAKE JR., CHAPTER 11 REORGANIZATIONS § 12:1 (2d ed. 2017).

⁹ See Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 611 (2009). *But see* Lynn M. LoPucki, *Chapter 11: Changes in Chapter 11 Success Levels Since 1980*, 87 TEMP. L. REV. 989, 993 (2015) (arguing Warren and Westbrook’s argument “overvalues confirmation as a criterion and conflates it with other success criteria, particularly plan performance and business survival”) The authors of the two articles do not, however, disagree on the importance of “business survival.” LoPucki, *supra*, at 998–99; Daniel J. Bussel, *Textualism’s Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 946 (2000) (“Analysis of random bankruptcy cases indicates that pragmatic interpretive methods continue to be the norm in the bankruptcy field.”).

¹⁰ *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 389 (1993).

discussion details a summary of the existing Code and several of its pertinent intricacies.

1. *Impaired Versus Unimpaired Creditors Under § 1124*

Determining which claims or classes of claims are impaired and unimpaired is important for the viability of a reorganization plan.¹¹ Impaired creditors under chapter 11 have a right to vote on whether to accept a reorganization plan; unimpaired creditors, however, do not have this right.¹² Unimpaired creditors are “conclusively presumed to have accepted the plan.”¹³ Section 1124 describes two exceptions in which a class of claims or interest is considered unimpaired.¹⁴ In the first exception, a claim is considered unimpaired if the plan “leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest.”¹⁵ Under the second exception, a claim is considered unimpaired if a creditor receives accelerated payment of claim or interest and the default is “cured,” among other requirements.¹⁶

By objecting, an impaired creditor can prevent or substantially thwart a reorganization plan from being approved by the court, especially when there is only one creditor.¹⁷ To determine if a claim or interest is impaired, one must examine § 1124 of the Code, which states that:

[A] class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or

¹¹ A class of claims or interests may be impaired in one of two ways: (1) where the plan alters the legal, equitable, or contractual rights of the claim or interest holders; (2) where the plan fails to: cure defaults, reinstate the mature of claims or interests, compensate the claim or interest holders for any damages, or otherwise impairs the rights of the holders. 7 COLLIER ON BANKRUPTCY, *supra* note 7, ¶ 1124.1.

¹² 11 U.S.C. § 1126 (2012).

¹³ *Id.*; see also David Gray Carlson, *Postdefault Interest Rates in Bankruptcy*, 2015 U. ILL. L. REV. 617, 644.

¹⁴ See 11 U.S.C. § 1124.

¹⁵ *Id.*

¹⁶ *Id.* § 1124(2)(A).

¹⁷ See *id.* § 1126(c), (d) (“A class of interests has accepted a plan if such plan has been accepted by holders of such interests . . . that hold at least two-thirds in amount and more than one-half in number of the allowed interests . . .”). Courts have additionally held that in spite of no objection, courts must independently determine if the plan satisfies all necessary requirements for confirmation. *In re William*, 850 F.2d 250, 253 (5th Cir. 1988) (quoting *In re Holthoff*, 58 B.R. 216, 218 (Bankr. E.D. Ark. 1985)).

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—

(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title or of a kind that section 365(b)(2) expressly does not require to be cured;

(B) reinstates the maturity of such claim or interest as such maturity existed before such default;

(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law;

(D) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and

(E) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.¹⁸

This provision provides debtors with two alternatives in which otherwise impaired claims can be considered unimpaired. The second alternative, in § 1124(2), provides for five additional requirements (other than the requirements found in § 1124(2)(A)) that a debtor must satisfy to render a claim unimpaired.¹⁹ Each of these additional requirements renders the creditor whole in some way and ensures the claims retain “all of their prepetition legal, equitable, and contractual rights against the debtor.”²⁰ The legislative history behind the amendments sheds light on this provision. As the Senate Report on the Bankruptcy Reform Act of 1994 (“the Act”) noted, a “claim or interest is

¹⁸ 11 U.S.C. § 1124.

¹⁹ *Id.*

²⁰ *Bank of Am. Nat’l Tr. & Sav. Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 441 n.14 (1999) (citing 11 U.S.C. § 1124).

unimpaired by curing the effect of a default and reinstating the original terms of an obligation.”²¹

2. *Contents of a Plan: Requirements and Options under § 1123*

Section 1123(a) prescribes the requirements for what a chapter 11 bankruptcy plan must include.²² One requirement is that the plan “provide adequate means for the plan’s implementation, such as . . . curing or waiving [] any default.”²³ Section 1123(b) sets forth optional elements of what a plan “may” do, subject to § 1123(a).²⁴ Subsection (c) applies to an individual debtor’s property exempted under § 522.²⁵ Section 1123 did not contain any reference to “cure” until Congress passed the Act. Under the Act, Congress amended § 1123, adding subsection (d) to require that any cure accord with the underlying contract and nonbankruptcy law.²⁶

In 1994, in an effort to expressly overrule a Supreme Court case, *Rake v. Wade*,²⁷ Congress prescribed how a plan may “cure” a default and importantly, included the same definition of “cure” in three sections: §§ 1123, 1222, and 1322.²⁸ The definition provides:

Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.²⁹

Notably (and confusingly), Congress did not include the same language in § 1124 to define cure. Creditors, seizing on the new definition, sought to apply

²¹ S. Rep. No. 95-989, 95th Cong., 2d Sess. (1978) 120, U.S. Code Cong. & Ad. News 1978, pp. 5787, 5906.

²² See 11 U.S.C. § 1123.

²³ *Id.* § 1123(a)(5)(G).

²⁴ See *id.* § 1123(b).

²⁵ *Id.* § 1123(c).

²⁶ Ralph Brubaker, *Default Rates of Interest and Cure of a Defaulted Debt in a Chapter 11 Plan of Reorganization (Part I): Entz-White’s Overlooked Choice of Law Dimension*, BANKR. L. LETTER (Thomson Reuters, Saint Paul, Minn.), Dec. 2016, Westlaw, 36 No. 12 Bankruptcy Law Letter NL 1.

²⁷ 508 U.S. 464 (1993) (affirming the determination that respondent over-secured creditor was not entitled to interest on arrearages that petitioner debtors agreed to pay in their bankruptcy plans because the provisions of the Code entitled respondent to that amount of interest despite the terms of petitioners’ debt instruments).

²⁸ Bankruptcy Reform Act of 1994, 1994 Enacted H.R. 5116, 103 Enacted H.R. 5116, 108 Stat. 4106, 4134.

²⁹ 11 U.S.C. § 1123(d).

the § 1123 definition to the § 1124(2)(A) context, arguing that defaults should be cured consistent with the “underlying agreement and applicable nonbankruptcy law.”³⁰ In doing so, creditors took what many commentators believed to be a pro-debtor amendment and used it to their own advantage. As a result, some courts apply § 1123’s prescription of what constitutes a cure, while others continue to acknowledge the common law definition of cure in the context of § 1124.³¹

Figure 1³²

<i>Statute</i>	<i>Application to chapter 11 cure</i>
§ 502	Allowance or disallowance of claims
§ 1123(a)(5)(G)	Permits a plan to include a provision for the curing or waiving of any default
§ 1123(d)	Code provision at issue
§ 1124(2)	Defines whether a claim is impaired
§ 1126(f)	Provides a conclusive presumption that a class of holders of unimpaired claims has accepted the plan
§ 1129	Sets forth the chapter 11 confirmation standards

3. Development of Cure’s Definition

The Code does not define “cure.”³³ Prior to the Act, “courts typically looked for guidance to § 1124’s discussion of what constitutes an impaired claim.”³⁴ Courts often fashioned their own definition, relying upon § 1124 as a

³⁰ *Id.*

³¹ Compare *In re Sagamore Partners, Ltd.*, 620 F. App’x 864, 868–69 (11th Cir. 2015) (“Thus, under § 1124, any outstanding default-rate interest is ignored when determining whether a claim to a loan is impaired, but, as explained above, under § 1123, outstanding default-rate interest, if called for in the underlying agreement, precludes reinstating the original terms of the loan.”), with *In re Moody Nat. SHS Houston H, LLC*, 426 B.R. 667, 671–72 (Bankr. S.D.Tex. 2010) (holding that outstanding interest is not ignored when determining whether a claim is impaired).

³² *In re Moody Nat.*, 426 B.R. at 670.

³³ *In re Clark*, 738 F.2d 869, 871 (7th Cir. 1984); *In re Entz-White Lumber & Supply, Inc.*, 850 F.2d 1338, 1340 (9th Cir. 1988). There appears to be some confusion among courts regarding whether the Code now defines “cure.” Compare *In re Liberty Warehouse Assocs. Ltd. P’ship*, 220 B.R. 546, 548 (Bankr. S.D.N.Y. 1998) (“The Bankruptcy Code does not define ‘cure.’”), with *In re Sagamore Partners, Ltd.*, 2015 U.S. App. LEXIS 15382, at *9 (stating that “cure” was undefined in the Code until 1994).

³⁴ *In re Sagamore Partners, Ltd.*, 620 F. App’x at 868–69 (citing *In re Entz-White Lumber & Supply*, 850 F.2d at 1340); see also 11 U.S.C. § 1124.

springboard to define cure in the § 1123 context.³⁵ Appellate courts also developed a definition of “cure” when they adjudicated chapter 13 cases; their approach is informative for the purpose of defining “cure” within chapter 11.³⁶ For instance, the Second Circuit held, in a chapter 13 dispute, that one cures a default³⁷ by “taking care of the triggering event and returning to pre-default conditions.”³⁸ Similarly, the Ninth Circuit held that a cure permits a debtor to pay or bring current arrearages on the debt and reinstate it.³⁹

The Ninth Circuit largely applied the Second Circuit’s definition and its own definition of chapter 13 “cure” to the chapter 11 context, stating the “underlying concept of cure is the same throughout the Bankruptcy Code.”⁴⁰ The Seventh Circuit in *In re Clark* found that a claim was “cured” in the chapter 13 context when the debtor “remed[ied] or rectif[ied] the default and restore[d] matters to the *status quo ante*.”⁴¹ Four months later, the Seventh Circuit cited its fresh precedent in a chapter 11 case, holding that § 1124 allows a debtor to “reinstate the original terms of the [] agreement, without impairing the creditor’s claim.”⁴²

³⁵ *Id.* at 866 (citation omitted); see *In re Entz-White Lumber & Supply*, 850 F.2d at 1342 (“[T]he power to cure under the Bankruptcy Code authorizes a plan to nullify all consequences of default, including avoidance of default penalties such as higher interest). But see *In re Southland Corp.*, 160 F.3d 1054, 1059 (5th Cir. 1998) (“The intent to effect a ‘cure’ could not be inferred from § 1124”).

³⁶ See *In re Metz*, 820 F.2d 1495, 1497 (9th Cir. 1987) (finding that the cure provisions of chapter 13 allow “the debtor to ‘cure’ (i.e., pay or bring current) arrearages on the debt and thereby reinstate the debt.”); *In re Clark*, 738 F.2d at 872 (determining that “cure” means to restore matters to the *status quo ante*). The definitions fashioned in both *In re Metz* and *In re Clark* arose in the context of chapter 13 bankruptcy cases, but they remained relevant to the definition of “cure” for the purposes of chapter 11. See *In re Entz-White Lumber & Supply*, 850 F.2d at 1339–40 n.1 (“*Taddeo*, *Metz*, and *Clark* involve cure under Chapter 13, rather than Chapter 11. Although Chapter 13 restricts allowable cures in ways that Chapter 11 does not, the underlying concept of cure is the same throughout the Bankruptcy Code.”); *In re Taddeo*, 685 F.2d 24, 26 (2d Cir. 1982) (“[C]uring a default’ in Chapter 11 means the same thing as it does in Chapters 7 or 13 . . .”).

³⁷ The Second Circuit defines “default” as “an event in the debtor-creditor relationship which triggers certain consequences . . .”). *In re Taddeo*, 685 F.2d at 26 (2d Cir. 1982); see also *In re Entz-White Lumber & Supply*, 850 F.2d at 1340 (9th Cir. 1988) (adopting *In re Taddeo*’s definition of “default”).

³⁸ *In re Taddeo*, 685 F.2d at 26.

³⁹ *In re Metz*, 820 F.2d at 1497.

⁴⁰ *In re Entz-White Lumber & Supply*, 850 F.2d at 1340 n.1.

⁴¹ 738 F.2d at 872 (“[‘Cure’] refers to [] the restoration of the way things were before the default. Thus, the plain meaning of cure . . . is to remedy or rectify the default and restore matters to the *status quo ante*.”).

⁴² *In re Madison Hotel Assocs.*, 749 F.2d 410, 420 (7th Cir. 1984). The Seventh Circuit’s decision in *In re Madison* includes a robust and thorough discussion of the legislative history of § 1124(2).

A claim or interest is unimpaired by curing the effect of a default and reinstating the original terms of an obligation when maturity was brought on or accelerated by the default. The intervention of bankruptcy and the defaults represent a temporary crisis which the plan of reorganization is intended to clear away.

The distinction between pre-default and prebankruptcy status is important for the purposes of determining default-rate interest. Indeed, returning the debtor to a *pre-default* position completely eliminates the default-rate interest. *Prebankruptcy* status does not afford such a luxury, however, and the default rate would remain intact and due if the debtor defaulted.

A prominent definition of “cure,” fashioned by appellate courts before the Act, concluded that cure required returning the parties to their positions prior to *default*.⁴³ The Fifth Circuit failed to adopt such a definition. Instead, the Fifth Circuit refused to refer to § 1124 in framing cure’s definition and held that it was “entirely sensible to interpret ‘reinstatement’ as returning the parties to their pre-bankruptcy rather than their pre-default status.”⁴⁴ The court disagreed with the debtor’s argument that cure’s meaning for the purposes of § 1124 developed by common law jurisprudence could help inform the understanding of “cure” for the purposes of § 1123 (the statute proscribing requirements for the plan).⁴⁵ Instead, the court concluded that “no part of the Code compels the inference of cure” from § 1124, the section describing what constitutes an unimpaired plan.⁴⁶ Although the Fifth Circuit’s decision came down *after* the Act, the Act did not retroactively apply to agreements and loans entered into before its implementation.⁴⁷

4. *Prohibition Against Collecting Both Late Fees and Default-Rate Interest*

As one court explained, default interest rates are used

[A]s a means to compensate a lender for the administrative expenses and inconvenience in monitoring untimely payments. Because the costs incurred in performing this task will vary from case to case, the increased interest rate is a compromise by the lender and the

Id. (citing S. Rep. No. 989, 95th Cong., 2d Sess. 120, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5906).

⁴³ See *In re Entz-White Lumber & Supply*, 850 F.2d at 1342 (“[T]he power to cure under the Bankruptcy Code authorizes a plan to nullify all consequences of default, including avoidance of default penalties such as higher interest); *In re Metz*, 820 F.2d at 1497 (holding that the cure provisions of chapter 13 allow “the debtor to ‘cure’ (i.e., pay or bring current) arrearages on the debt and thereby reinstate the debt”); *In re Clark*, 738 F.2d at 872 (“[W]hat the term [“cure”] refers to is the restoration of the way things were before the default.”).

⁴⁴ *In re Southland Corp.*, 160 F.3d 1054, 1059 (5th Cir. 1998).

⁴⁵ *Id.*

⁴⁶ *Id.* The court further and concluded that because the Banks’ claims were unimpaired, § 1124 was inapplicable and the definition of “cure” was not “fungible.” *Id.*

⁴⁷ *Id.* at 1059 n.6.

borrower in recognition of the fact that attempting to quantify the exact dollar amount of the lender's injury would be impractical.⁴⁸

In thinking about disputes over interest and interest rates in chapter 11 bankruptcy proceedings, it helps to separate “interest” into three distinct categories: (1) “prepetition interest,” which accrued prior to the filing of a chapter 11 petition; (2) “pendency interest,” which accrues between the petition date and the effective date of the debtor's reorganization plan; and (3) “plan interest,” which will accrue as of the effective date of the plan.⁴⁹ While the three aforementioned types of interest are generally agreed upon, one commentator has argued that the Act created a fourth type: “arrearage interest” (i.e., compound interest).⁵⁰ The three agreed-upon temporal categories of interest are characterized by unique restrictions under the Code.⁵¹ For example, the Code prevents oversecured creditors⁵² from receiving *both* default-rate interest *and* late charges.⁵³

A separate argument has arisen regarding post-petition interest.⁵⁴ This Comment, however, concerns only default-rate (arrearage) interest. Specifically, this Comment addresses interest rates that increase as a direct result of a debtor's default, irrespective of *how* the default occurs. This Comment will argue that default-rate interest, despite now-uniform decisions from circuits to the contrary, should not be required to cure a claim.

⁴⁸ *In re Vest Assocs.*, 217 B.R. 696, 701 (Bankr. S.D.N.Y. 1998) (citing *In re Terry*, L.P., 27 F.3d 241, 244, *cert. denied*, 513 U.S. 948 (1994)).

⁴⁹ Pawlowic, *supra* note 1, at 151; see ELIZABETH WARREN & JAY WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 461–66 (2d ed. 1991).

⁵⁰ Pawlowic, *supra* note 1, at 151–52, 178–82. Professor Pawlowic notes how § 305 of the Act “simply creates a separate rule for determining the amount necessary to cure a default and divorces that rule from the ordinary rules for determining prepetition, pendency, and plan interest.” *Id.* at 179.

⁵¹ See generally *id.* at 151–52 (stating (1) prepetition is allowable to the extent and at the rate allowed by state law, (2) pendency interest is generally not allowed except to the extent established by traditional and long-existing exceptions for a solvent debtor; and (3) plan interest is “provided for under the reorganization chapters of the Code at the current market rate”).

⁵² A creditor is oversecured when the value of collateral exceeds the amounts of the creditor's allowed secured claim. See 4 COLLIER ON BANKRUPTCY, *supra* note 7, ¶ 506.03; Evan D. Flaschen, *Adequate Protection for Oversecured Creditors*, 61 AM. BANKR. L.J. 341, 343 (1987).

⁵³ *In re Sagamore Partners, Ltd.*, 512 B.R. 296, 315 (S.D. Fla. 2014), *aff'd in part, rev'd in part and remanded sub nom. JPMCC 2006-LDP7 Miami Beach Lodging, LLC v. Sagamore Partners, Ltd.* (*In re Sagamore Partners, Ltd.*), 610 F. App'x 922 (11th Cir. 2015) (citing *In re Vest Assoc.*, 217 B.R. at 701). Allowing a creditor to collect both default-rate interest and late charges from the debtor would be inequitable and unreasonable within the meaning of § 506(b). 11 U.S.C. § 506 (2012). *In re 1095 Commonwealth Ave. Corp.*, 204 B.R. 284, 305 (Bankr. D. Mass. 1997).

⁵⁴ See generally Carlson, *supra* note 13, at 618 (stating a question exists as to whether oversecured creditors are entitled to receive higher postdefault interest rates per the agreement).

II. BACKGROUND

This section will proceed in three parts. First, it will identify cases decided prior to the Act's implementation, which helped inform the "cure" jurisprudence before Congress's amendments. Second, this section will explore the impetus and congressional intent of the Act's amendment of § 1123(d). Third, this section will evaluate several illuminating cases decided after the Act's passage. *JPMCC 2006-LDP7 Miami Beach Lodging, LLC v. Sagamore Partners, Ltd. (In re Sagamore Partners, Ltd.)* provides a useful summary of the diverging views on whether "cure" includes default-rate interest.⁵⁵ To understand the problem, a brief summary of the pertinent facts of *In re Sagamore Partners, Ltd.* is instructive.

A. JPMCC 2006-LDP7 Miami Beach Lodging, LLC v. Sagamore Partners, Ltd.

Sagamore Partners owned Sagamore Hotel.⁵⁶ Martin Taplin wholly held and controlled 100% of Sagamore Partners when Sagamore Partners filed for chapter 11 bankruptcy relief.⁵⁷ In 2006, Sagamore Partners executed a \$31.5 million loan from Arbor Commercial Mortgage, LLC for the "luxurious" hotel, secured by a mortgage on the property.⁵⁸ Arbor Commercial Mortgage then assigned the loan to JPMCC.⁵⁹ The loan agreement set interest at 6.54%, with Sagamore to make interest-only payments each month.⁶⁰ Upon maturity (April 11, 2016), the base loan and all amounts remaining would become payable to the creditor.⁶¹ However, in "any Event of Default"⁶² interest increased to 11.54%.⁶³ Additionally, the agreement provided that Sagamore Partners would be responsible for late fees in the event of default; later, all parties agreed that the late fee provisions were impermissible under applicable law.⁶⁴ In August

⁵⁵ 610 F. App'x 922 (11th Cir. 2015).

⁵⁶ *Id.* at 925.

⁵⁷ *Id.*

⁵⁸ SAGAMORE, <http://www.sagamorehotel.com> (last visited Sept. 25, 2015); *In re Sagamore Partners, Ltd.*, 512 B.R. 296, 301 (S.D. Fla. 2014).

⁵⁹ *In re Sagamore Partners, Ltd.*, 610 F. App'x at 925.

⁶⁰ *In re Sagamore Partners, Ltd.*, 512 B.R. at 301.

⁶¹ *Id.*

⁶² The loan agreement stipulated that a default would occur when "any regularly scheduled payment with respect to any portion of the Debt when due." *In re Sagamore Partners, Ltd.*, 610 F. App'x at 924.

⁶³ *In re Sagamore Partners, Ltd.*, 512 B.R. at 301.

⁶⁴ *Id.* at 318.

2009, Sagamore Partners did not make its monthly payment and failed to make every payment thereafter.⁶⁵

After filing for bankruptcy, but before JPMCC commenced foreclosure proceedings, Sagamore Partners filed a reorganization plan in which it proposed to cure the loan held by JPMCC by paying all amounts due and rendering the loan unimpaired.⁶⁶ Originally, JPMCC chose to charge late fees, which totaled approximately \$250,000.⁶⁷ In fact, Sagamore Partners had already paid late fees assessed by JPMCC.⁶⁸ As a result, the bankruptcy court concluded JPMCC's choice of late fees precluded it from later electing to charge default-rate interest,⁶⁹ as creditors "may receive payment of either default interest or late charges, but not both."⁷⁰ The district court affirmed the ruling.

The Eleventh Circuit overruled both courts with regard to the discrepancy between late fees and default interest, surmising that: (1) JPMCC demanded both late fees and default-rate interest; (2) JPMCC only accepted late fees under protest; and (3) receiving payment under protest does not constitute a waiver.⁷¹ The parties disagreed about whether the debtor had to pay the default-rate interest, totaling \$5,416,250.⁷² The debtor argued that payment of default-rate interest was not required to satisfy the requirement of § 1124(2), which the debtor claimed served as the authority to avoid default-rate interest.⁷³ The creditor demanded interest at the default rate of 11.54% and insisted its claim was not "cured" unless the default interest was paid. The creditor took exception to the debtor's theory that § 1124(2) granted the authority to cure and, instead, contended that such a cure "must comply with [§] 1123(d) of the" Code.⁷⁴

The bankruptcy judge agreed with the creditor; the court held that the debtor must pay all amounts due, including default-rate interest, to cure its default on the loan.⁷⁵ Later, for reasons other than statutory interpretation

⁶⁵ *In re Sagamore Partners, Ltd.*, 610 F. App'x at 925.

⁶⁶ *In re Sagamore Partners, Ltd.*, 512 B.R. at 302.

⁶⁷ *Id.* at 315.

⁶⁸ *Id.* at 318.

⁶⁹ *Id.* at 315.

⁷⁰ *Id.*

⁷¹ *In re Sagamore Partners, Ltd.*, 610 F. App'x 922, 926–29 (11th Cir. 2015).

⁷² *In re Sagamore Partners, Ltd.*, 512 B.R. at 302.

⁷³ *In re Sagamore Partners, LTD*, 2012 Bankr. LEXIS 3224, at *10 (Bankr. S.D. Fla. July 10, 2012).

⁷⁴ *Id.*

⁷⁵ *In re Sagamore Partners, Ltd.*, 512 B.R. at 302.

based on the definition of a “cure,” the bankruptcy court held JPMCC was not entitled to default-rate interest. Sagamore Partners appealed.

On appeal before the Eleventh Circuit, Sagamore Partners’ argument relied heavily on pre-1994 court rulings and musings about the legislative intent of § 1123(d). JPMCC (and the Eleventh Circuit’s holding) largely based its argument on the plain language of the statute. The court’s stance on the implications of § 1123(d) began and ended with one consideration: plain language.⁷⁶ By limiting its analysis to only the language, the court deprives us of any analysis of the Act’s impetus, the implications Congress pondered, and the practical results of a ruling potentially at odds with congressional intent. The panel recognized, however, that this issue was a point of contention across the circuit courts, citing a Ninth Circuit case as evidence that the issue was far from settled.⁷⁷

After concluding the “straightforward statutory command”⁷⁸ demanded payment of default-rate interest for the purposes of § 1123(d), the court held the default-rate interest complied with existing Florida law and reversed the denial of default-rate interest.⁷⁹ In full, the court held:

[I]n 1994, Congress enacted amendments to the Bankruptcy Code that, among other things, provided the previously missing definition of “cure.” See 11 U.S.C. § 1123(d). In pertinent part, § 1123(d) states that, “[n]otwithstanding subsection (a) of this section . . . if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.” Given this “straightforward statutory command” in § 1123(d), “there is no reason to resort to legislative history.” *United States v. Gonzales*, 520 U.S. 1, 6, 117 S. Ct. 1032, 137 L. Ed. 2d 132 (1997). Therefore, we read the current iteration of the Bankruptcy Code to require a debtor to cure its default in accordance with the underlying contract or agreement, so long as that document complies with relevant nonbankruptcy law. See *In re Southland Corp.*, 160 F.3d 1054, 1059 n.6 (5th Cir. 1998) (“Congress, in bankruptcy amendments enacted in 1994, arguably rejected the *Entz-White* denial of contractual default interest rates”); but see *Sylmar*, 314 F.3d 1070, 1075 (9th Cir. 2002)

⁷⁶ *In re Sagamore Partners, Ltd.*, 610 F. App’x at 927 (citing *U.S. v. Gonzales*, 520 U.S. 1, 6 (1997)).

⁷⁷ JPMCC 2006-LDP7 Miami Beach Lodging, LLC v. Sagamore Partners, Ltd. (*In re Sagamore Partners, Ltd.*), 620 F. App’x 864, 869 (11th Cir. 2015) (citing *Platinum Capital, Inc. v. Sylmar Plaza, L.P.* (*In re Sylmar Plaza, L.P.*), 314 F.3d 1070, 1075 (9th Cir. 2002)).

⁷⁸ *Id.* (quoting *U.S. v. Gonzales*, 520 U.S. 1, 6 (1997)).

⁷⁹ *Id.* at 872.

(holding that, with respect to 11 U.S.C. § 1129(a)(3), *Entz-White* remains good law).⁸⁰

B. Pacifica L 51 LLC v. New Investments, Inc.

Although *In re Entz-White Lumber & Supply, Inc.* retained strong precedential value in the Ninth Circuit at the time the Eleventh Circuit decided *In re Sagamore Partners, Ltd.*, it no longer remains “good law.”⁸¹ The Ninth Circuit revisited *In re Entz-White* and ultimately rejected the prior panel’s holding in *Pacifica L 51 LLC v. New Investments Inc. (In re New Investments, Inc.)*.⁸² In *In re New Investments*, the note called for an 8% interest rate.⁸³ If the debtor defaulted, the interest rate rose to 13%.⁸⁴

While the court noted its decision in *In re Entz-White*, it ultimately rejected the prior panel’s holding because the plain language “compel[led]” it.⁸⁵ This decision was reached despite the fact that *In re Entz-White* was decided after the Act’s implementation.⁸⁶

The Ninth Circuit provided additional justification beyond mere plain language. Judge Mary Murguia, writing for the majority, went on to conclude that “legislative history would not help” the debtor.⁸⁷ It matters not, the majority reasoned, that Congress intended to overturn *Rake* and not speak to this particular issue.⁸⁸ The panel split two-to-one, and Judge Berzon authored a forceful dissent, stating that neither the statute’s text nor its legislative history justified the majority’s decision.⁸⁹ She began by stating Congress had not displaced *In re Entz-White* by passing the Act.⁹⁰ The Ninth Circuit in *In re Entz-White* determined curing a default meant “nullify[ing] all consequences of the default.”⁹¹ And because § 1123(d)’s text did not provide “guidance on which of the note’s provisions govern[ed],” *In re Entz-White* should continue to do so.⁹²

⁸⁰ *Id.* at 869.

⁸¹ JPMCC 2006-LDP7 Miami Beach Lodging, LLC v. Sagamore Partners, Ltd. (*In re Sagamore Partners, Ltd.*), 620 F. App’x 864, 869 (11th Cir. 2015).

⁸² 840 F.3d 1137 (9th Cir. 2016).

⁸³ *Id.* at 1139.

⁸⁴ *Id.*

⁸⁵ *Id.* at 1141.

⁸⁶ *Id.* at 1145.

⁸⁷ *Id.* at 1141.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1143.

⁹⁰ *Id.*

⁹¹ *Id.* (quoting *In re Entz-White Lumber & Supply, Inc.*, 850 F.2d 1338, 1342 (9th Cir. 1988)).

⁹² *Id.* at 1144.

C. Notable Cases Prior to the Act

Courts were originally free to construe and craft their own definitions of “cure.”⁹³ In addition to relying upon sister circuits’ chapter 11 definition of “cure,” bankruptcy, district, and circuit courts often borrowed from the definition of “cure” developed in the chapter 13 context. The following cases exemplify how the definition of “cure” evolved through case law, particularly highlighting cases in various circuits that explore whether default-rate interest is a requirement to “cure” a default.

1. In re Taddeo

A Second Circuit case, *In re Taddeo*,⁹⁴ is a hallmark decision from which other circuits borrowed the definition of cure.⁹⁵ *In re Taddeo* concerned a chapter 13 case in which the debtors defaulted upon their mortgage. As a result, the creditor did three things: (1) accelerated the mortgage; (2) demanded full balance of the mortgage; and (3) initiated foreclosure proceedings.⁹⁶ The debtors sought refuge under chapter 13 and proposed to cure the default.⁹⁷

The debtors’ proposal required debtors to pay the mortgage in arrears in monthly installments of \$100, but it did not include a provision calling for the debtors to accelerate the plan.⁹⁸ As a result, the creditor objected to the plan and petitioned the court for relief from the automatic stay to foreclose upon the residence.⁹⁹ The creditor submitted a claim for \$14,148.18, the total amount of the accelerated mortgage.¹⁰⁰ The question answered by the Second Circuit was “can [the debtor] pay arrearages to [the creditor] and thereby cure the default and reinstate the mortgage” or, alternatively, must the mortgage be accelerated?¹⁰¹ The court held the former, and ruled in favor of the debtor.

⁹³ See *In re Liberty Warehouse Associates Ltd. P’ship*, 220 B.R. 546, 548 (Bankr. S.D.N.Y. 1998) (“The Bankruptcy Code does not define ‘cure.’”).

⁹⁴ 685 F.2d 24 (2d Cir. 1982).

⁹⁵ See *In re Entz-White Lumber & Supply*, 850 F.2d at 1340 (stating the Second Circuit’s understanding of what “curing a default” means); *In re Udhus*, 218 B.R. 513, 515 (B.A.P. 9th Cir. 1998) (stating the Ninth Circuit has adopted the Second Circuit’s definition of cure as its *In re Taddeo* decision).

⁹⁶ *In re Taddeo*, 685 F.2d at 25.

⁹⁷ *Id.*

⁹⁸ *Id.* at 26.

⁹⁹ *Id.* at 25.

¹⁰⁰ *In re Taddeo*, 9 B.R. 299, 301 (Bankr. E.D.N.Y.), *aff’d*, 15 B.R. 273 (E.D.N.Y. 1981), *aff’d*, 685 F.2d 24 (2d Cir. 1982).

¹⁰¹ *In re Taddeo*, 685 F.2d at 25 (“[T]he question of whether under the plan the Taddeos can pay arrearages to [the creditor] and thereby cure the default and reinstate the mortgage is squarely presented for decision.”).

The bankruptcy court began its analysis by “dispel[ling] the myth that once a mortgage has been accelerated a federal bankruptcy court can never undo the acceleration.”¹⁰² Relying upon § 1124, the court “analogiz[ed]” a cure under chapter 13 to one under § 1124, which allowed a debtor to de-accelerate the mortgage and resume regular payments.¹⁰³ The Second Circuit concluded that the power to cure necessarily included the power to de-accelerate.¹⁰⁴

2. *In re Entz-White Lumber & Supply, Inc.*

The Ninth Circuit decided *In re Entz-White*¹⁰⁵ before the passage of the Bankruptcy Reform Act of 1994, and until *In re New Investments, In re Entz-White* was the case to which many courts within the circuit adhered.¹⁰⁶ In this case, the debtor borrowed \$4,170,175 on a promissory note, with interest set at 1.5%.¹⁰⁷ Pursuant to the promissory note, should the debtor fail to repay the loan, an 18% interest rate would apply (equaling an additional \$190,617).¹⁰⁸ The creditor, Great Western, however, disagreed and insisted that it was entitled to receive post-default interest at the default rate of 18%.¹⁰⁹

On appeal, the creditor argued that because the debtor had defaulted before filing for relief (as the debtor did in *In re Sagamore Partners, Ltd.*), payment of interest at the default rate was required before the debtor’s default could be “cured.”¹¹⁰ The creditor also asserted that “cure” should be limited to “defaults that result in acceleration.”¹¹¹

The Ninth Circuit ultimately ruled in favor of the creditor, upholding both the bankruptcy and district courts.¹¹² “By curing the default,” the court stated, “[the debtor] is entitled to avoid all consequences of the default—including higher post-default interest rates.”¹¹³ Finally, the court concluded: “[I]t is clear

¹⁰² *In re Taddeo*, 9 B.R. at 302.

¹⁰³ *In re Taddeo*, 685 F.2d at 26.

¹⁰⁴ *Id.* at 28.

¹⁰⁵ 850 F.2d 1338 (9th Cir. 1988).

¹⁰⁶ *In re New Invs., Inc.*, 840 F.3d 1137, 1139 (9th Cir. 2016) (holding *In re Entz-White*’s rule permitting cure of debt sans post-default interest rate is no longer acceptable pursuant to § 1123(d)); see *In re Phx. Bus. Park Ltd. Pshp.*, 257 B.R. 517, 519 (Bankr. D. Ariz. 2001) (“The Ninth Circuit has uniformly followed the *Entz-White* interpretation of “cure” since 1988 and it remains the law of the circuit today.”).

¹⁰⁷ *In re Entz-White*, 850 F.2d at 1339.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1340–41.

¹¹¹ *Id.* at 1341.

¹¹² *Id.* at 1340.

¹¹³ *Id.* at 1342.

that the power to cure under the Bankruptcy Code authorizes a plan to nullify all consequences of default”¹¹⁴

3. *Southland Corp. v. Toronto Dominion (In re Southland Corp.)*

A circuit split over whether post-default interest is required to “cure” a creditor almost arose in a case in which the Act was inapplicable.¹¹⁵ In *Southland Corp v. Toronto Dominion (In re Southland Corp.)*, a case to which the Act did not apply, the underlying agreement called for a 2% increase in the event of default.¹¹⁶ The district court and bankruptcy court determined that, to cure its default, the debtor was required to pay interest at the default rate during the period beginning on the date that the debtor defaulted and continuing until the effective date of the debtor’s reorganization plan. In upholding the lower courts’ decisions, the Fifth Circuit not only took an opinion opposite of the Ninth Circuit; it accused the Ninth Circuit of “misread[ing]”¹¹⁷ *In re Entz-White* (the Ninth Circuit’s own precedent) and producing opinions that were “poorly-reasoned.”¹¹⁸

In re Southland differed from *In re Sagamore Partners, Ltd.*, however, in that it concerned an impaired class of creditors who voted in favor of a debtor’s reorganization plan.¹¹⁹ After the bankruptcy court confirmed the plan,¹²⁰ the oversecured creditors filed a proof of claim that did not specifically mention default-rate interest.¹²¹ Thus, any outcome of the case provides only persuasive authority, and, at best, authority that is antiquated and outdated given that the Fifth Circuit ostensibly was not permitted to take into consideration the amendment of the Act because the parties’ agreement predated the Act.

4. *Rake v. Wade*

In *Rake v. Wade*, the Supreme Court considered whether a chapter 13 debtor had to pay post-petition interest on arrearages to cure a default on an

¹¹⁴ *Id.*

¹¹⁵ See *In re Southland Corp.*, 160 F.3d 1054, 1059 n.6 (5th Cir. 1998).

¹¹⁶ *Id.* at 1056.

¹¹⁷ *Id.* at 1058 n.5.

¹¹⁸ *Id.* at 1058.

¹¹⁹ *Id.* at 1057.

¹²⁰ *Id.*

¹²¹ *Id.*

oversecured home.¹²² The debtors defaulted on a note that allowed for a \$5 charge for each payment missed, but the note was silent as to interest on arrearages.¹²³ Before the debtor's plan was confirmed, the oversecured creditor objected to the debtor's proposal to make all future payments and cure the default by paying the arrearages without interest. The creditor asserted that § 506(b) entitled it to interest, but the bankruptcy and district courts disagreed and overruled the creditor's objection. The court of appeals reversed, however, and held that the creditor was entitled to post-petition interest on the arrearages "even if the mortgage instruments are silent on the subject and state law would not require interest to be paid."¹²⁴ Essentially, the Court held the Code required such interest despite the fact that "state law and the underlying agreement did not"¹²⁵

The Court held that the oversecured creditor was entitled to interest, even though the contract only specified a \$5 rate.¹²⁶ Congress took exception to Justice Thomas's ten-page opinion and responded accordingly. The Court, in Congress's estimation, contravened the contract and provided a "windfall" to the creditors at "the expense of unsecured creditors by forcing debtors to pay the bulk of their income to satisfy the secured creditors' claims."¹²⁷ As part of the Act, Congress attempted to rectify the decision by including an amendment in a large package of amendments.

C. *Impetus of the 1994 Amendment*

As the House Report noted, § 1123(d) was meant to "overrul[e] the decision of the Supreme Court in *Rake v. Wade*."¹²⁸ Although *Rake* concerned a mortgagor under a chapter 13 bankruptcy plan, Congress designed the amendment to prevent a windfall to creditors.¹²⁹ The purpose of the amendment was to "limit the secured creditor to the benefit of the *initial* bargain."¹³⁰ The committee did not stop there. The report continued with a final note to create a

¹²² 508 U.S. 464, 466–67 (1993).

¹²³ *Id.* at 467.

¹²⁴ *Wade v. Hannon*, 968 F.2d 1036, 1042 (10th Cir. 1992), *aff'd sub nom. Rake v. Wade*, 508 U.S. 464 (1993).

¹²⁵ *In re Sagamore Partners, Ltd.*, 512 B.R. 296, 308 (S.D. Fla. 2014) (citation omitted).

¹²⁶ *Rake v. Wade*, 508 U.S. at 467.

¹²⁷ H.R. Rep. 103-835, 55, 1994 U.S.C.C.A.N. 3340, 3364.

¹²⁸ *Id.*

¹²⁹ *In re Phx. Bus. Park Ltd. P'shp.*, 257 B.R. 517, 521 (Bankr. D. Ariz. 2001).

¹³⁰ H.R. Rep. 103-835, 55, 1994 U.S.C.C.A.N. 3340, 3364 (emphasis added).

definition of “cure” to put the debtor in the same position “as if the default had never occurred.”¹³¹

Many courts that interpret “cure” as not requiring the payment of default-rate interest base their argument on the language in the House Report.¹³² According to the House Report, if the default “had never occurred,” default-rate interest would be inapplicable.¹³³ The report noted:

This section will have the effect of overruling the decision of the Supreme Court in *Rake v. Wade*, 113 S.Ct. 2187 (1993). In that case, the Court held that the Bankruptcy Code required that interest be paid on mortgage arrearages paid by debtors curing defaults on their mortgages. Notwithstanding State law, this case has had the effect of providing a windfall to secured creditors at the expense of unsecured creditors by forcing debtors to pay the bulk of their income to satisfy the secured creditors’ claims. This had the effect of giving secured creditors interest on interest payments, and interest on the late charges and other fees, even where applicable laws prohibits such interest and even when it was something that was not contemplated by either party in the original transaction. . . . It will limit the secured creditor to the benefit of the initial bargain with no court contrived windfall. It is the Committee’s intention that a cure pursuant to a plan should operate to put the debtor in the same position as if the default had never occurred.¹³⁴

The *Rake* decision meant creditors could charge interest not called for in the initial contract agreed upon by the parties.

D. Courts’ Reactions

In the aftermath of the 1994 amendment, courts understandably grappled with how to apply the new amendment to their interpretation of what constitutes a “cure” of default in the context of bankruptcies in which default-rate interest existed.¹³⁵ Lower courts in the Ninth Circuit largely continued to

¹³¹ *Id.*

¹³² *In re Phx. Bus. Park Ltd. Pshp.*, 257 B.R. 517, 518 (Bankr. D. Ariz. 2001).

¹³³ H.R. Rep. 103-835, 55, 1994 U.S.C.C.A.N. 3340, 3364.

¹³⁴ *Id.*

¹³⁵ *Compare* *CityBank v. Udhus* (*In re Udhus*), 218 B.R. 513, 518 (B.A.P. 9th Cir. 1998) (holding that cure should return the status of the parties to the same position in existence prior to the default and creditor received full payment by being pay at non-default rate), *and In re Zamani*, 390 B.R. 680, 686 (Bankr. N.D. Cal. 2008) (explaining no Ninth Circuit case suggested § 1123(d) “legislatively over[r]uled” *Entz-White*), *with In re Southland Corp.*, 160 F.3d 1054, 1059 n.6 (5th Cir. 1998) (stating that Congress’s “amendments enacted in 1994 [] rejected *Entz-White* . . .”). *See also In re Vest Assocs.*, 217 B.R. 696, 702 (Bankr. S.D.N.Y. 1998)

uphold *In re Entz-White*, while those within other circuits abandoned precedent defining “cure” and began interpreting cure according to the plain language of the new statute.¹³⁶

Although § 1123(d) was enacted after the Ninth Circuit’s decision in *In re Entz-White*, the Ninth Circuit continued to cite, rely on, and affirm *In re Entz-White* until its decision in *In re New Investments*.¹³⁷ In 2002, the Ninth Circuit held that *In re Entz-White* “lays to rest” any argument that a plan, which proposes to nullify the effects of a default, does not satisfy the Code’s requirements.¹³⁸ The explicit reference, without any caveat, offered at least circumstantial evidence that the Ninth Circuit still considers *In re Entz-White* to be good law.¹³⁹ With *In re New Investments*, that is no longer the case.

In *In re Udhuss*, the Ninth Circuit Bankruptcy Appellate Panel had even more explicitly adhered to *In re Entz-White* after the Act’s passage.¹⁴⁰ In *In re Udhuss*, a case decided in 1998, the court stated: “Under *Entz-White*, a § 1123 cure corrects all defaults and prohibits an award of default interest.”¹⁴¹ Thus, even if the Ninth Circuit’s statement about the continued effect of *In re Entz-White* in *In re Sylmar Plaza* is dicta, that decision, coupled with the court’s reliance on *In re Entz-White* in *In re Udhuss*, strongly suggested that *In re Entz-White* remained binding precedent in the Ninth Circuit. But the court’s decision in *In re New Investments* imperils the line of reasoning followed after *In re Entz-White*.

This Comment argues that the Ninth Circuit’s precedent pre-*In re New Investments* more closely resembled both Congress’s intent in passing the Act and the overarching goals of chapter 11.¹⁴² The following cases illustrate the

(“[T]here is an absence of uniformity in the treatment of default interest provisions.”) (citing *In re White*, 88 B.R. 498, 510 (Bankr. D. Mass. 1988)).

¹³⁶ *In re Southland Corp.*, 160 F.3d at 1058 (calling other cases “poorly reasoned”). It is important to note that the Fifth Circuit, in *In re Southland Corp.*, held the 1994 amendment were inapplicable because the original petition was filed in 1990. See Bankruptcy Reform Act of 1994, Pub. L. 103-394, October 22, 1994, 108 Stat 4106.

¹³⁷ *In re Sylmar Plaza, L.P.*, 314 F.3d 1070, 1075 (9th Cir. 2002).

¹³⁸ *Id.*

¹³⁹ See *id.* In fact, even the creditor in *In re Sylmar* acknowledged that a “debtor [may] use the provisions of 11 U.S.C. § 1124(2) to cure and reinstate a defaulted obligation as part of the ‘restructuring of a financially troubled entity.’” *Southeast, Entz-White* and *Udhuss* are quite clear on this point.” Appellant’s Reply Brief at 6, *Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.)*, 314 F.3d 1070 (9th Cir. 2002) (No. 00 57210), 2001 WL 34091267, at *6 (internal quotation omitted).

¹⁴⁰ See *In re Udhuss*, 218 B.R. 513 (B.A.P. 9th Cir. 1998).

¹⁴¹ *Id.* at 516.

¹⁴² STRICKLAND & DRAKE JR., *supra* note 8, § 12:1.

different approaches courts have taken following the Act's passage. The cases, taken together, portray how lower courts (i.e., non-appellate courts) grappled with the Act.

I. In re Sylmar Plaza, L.P.

In *In re Sylmar Plaza, L.P.*, the debtor's reorganization plan proposed to cure its default and, consequently, render the creditor unimpaired.¹⁴³ The creditor objected to the confirmation, however, positing that the plan—which did not include \$1 million in default-rate interest—was not proposed in good faith pursuant to § 1129(a)(3).¹⁴⁴ The creditor based its claim on two main arguments: (1) the entire plan was a “sham” contrived to obviate the debtor's responsibility to pay default-rate interest; and (2) the plan's intent to pay unsecured classes interest at a rate 1.13% higher than the interest it paid to secured classes amounted to unfair discrimination.¹⁴⁵

At base, a plan is proposed in good faith when it is consistent with the “objective and purposes of the [] Code.”¹⁴⁶ The creditor in *In re Sylmar Plaza* first argued that the debtor failed to act in good faith by proposing to not pay interest at the default rate.¹⁴⁷ The court rejected the creditor's argument, explaining that it was “[laid] to rest” by *In re Entz-White*.¹⁴⁸ The court quoted the holding of *In re Entz-White* in determining that, because of the “power to cure” under the Code, a chapter 11 plan may allow a debtor to avoid all consequences of its default, “including . . . default penalties such as higher interest.”¹⁴⁹ The court concluded by stating: “Given the specific power to cure default, it makes no sense to treat a plan invoking that power as lacking good faith.”¹⁵⁰ The court's decision, eight years after the Act's passage, provided strong evidence that the Ninth Circuit continued to consider the *In re Entz-White* holding good law—until *In re New Investments*.

¹⁴³ 314 F.3d 1070, 1073 (9th Cir. 2002).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1074.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1075.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

2. General Electric Capital Corp. v. Future Media Products

The rule in *In re Entz-White*, however, has not been applied without question—even within the Ninth Circuit. One Ninth Circuit case that portended the end of *In re Entz-White* is *GE Capital Corp. v. Future Media Products*.¹⁵¹ In *GE Capital Corp.*, the Ninth Circuit limited *In re Entz-White*, holding *In re Entz-White* does not apply to plans made under § 363.¹⁵² Because *GE* involved asset sales outside of a chapter 11 plan, the general *In re Entz-White* rule holding that an oversecured creditor was not entitled to interest at the default rate did not apply.¹⁵³ The parties entered into a \$10.5 million loan with a non-default interest rate of 1.5% per annum and a default interest rate of 2%.¹⁵⁴

Lower courts applied *In re Entz-White*, adopting its holding that to cure means to return the debtor to pre-default status. In *GE Capital Corp.*, the creditor's claim was paid in full by asset sales outside of a chapter 11 bankruptcy plan.¹⁵⁵ Because the asset sales transpired outside of the chapter 11 plan, the Ninth Circuit reasoned *In re Entz-White* did not apply and the court curtailed the extent to which certain plans would be subject to the *In re Entz-White* rule disallowing default-rate interest.¹⁵⁶

3. In re Phoenix Business Park Limited Partnership

In *In re Phoenix Business Park Limited P'ship*, the Bankruptcy Court for the District of Arizona heavily relied on the legislative history of § 1123(d) to hold that a debtor is not required to pay default-rate interest to “cure” its default.¹⁵⁷ In this case, a note specified a 10.75% interest rate and provided that the rate would increase to 24% in the event of default.¹⁵⁸ The debtor's proposal to cure the default and reorganize did not require the debtor to pay interest on the note at the specified default rate.¹⁵⁹ The creditor argued that the language

¹⁵¹ 536 F.3d 969 (9th Cir. 2008).

¹⁵² *Id.* at 973.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 971. The Ninth Circuit also further explained how it considers what a creditor is due, stating “the default rate should be enforced, subject only to the substantive law governing the loan agreement, unless a provision of the Bankruptcy Code provides otherwise.” *Id.*

¹⁵⁶ *Id.* at 973.

¹⁵⁷ 257 B.R. 517, 521–22 (Bankr. D. Ariz. 2001).

¹⁵⁸ *Id.* at 518.

¹⁵⁹ *Id.*

of § 1123(d) unambiguously required payment of default-rate interest as part of a § 1124(2) cure.¹⁶⁰

The court rejected the creditor's argument and ultimately held: "*Entz-White* remains good law in the Ninth Circuit and that a debtor needs to pay interest only at the contract rate, not at the default rate, and need not pay late charges in order to effectuate a cure under section 1124(2)."¹⁶¹ The court's opinion turned primarily on § 365(b) and its analysis of the congressional intent underlying § 1124(2). Congress amended § 365(b)(2)(D) at the same time it amended § 1123(d). Section 365(b)(2)(D), as amended in 1994, provides:

Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to . . . (D) the satisfaction of any penalty rate or [the satisfaction of any penalty] provision relating to a default arising from any failure of the Debtor to perform nonmonetary obligations under an executory contract of unexpired lease.

The court determined that a claim is unimpaired if the "default interest rate is a 'penalty rate[]'" despite no default interest being paid.¹⁶² The court had "little difficulty" determining that the 13% increase in the interest rate in the event of default constituted a penalty rate.¹⁶³

Congress's intent proved compelling—even outcome determinative. First, the court determined Congress's intent was "directly contrary" to a holding that default-rate interest is required to cure a default.¹⁶⁴ The court examined a House Report that explained that § 1123(d) was designed to prevent a windfall to creditors.¹⁶⁵ The inclusion of § 365(b)(2)(D) and its incorporation into § 1124(2)(A) also bolstered the notion that congressional intent favored the debtor.¹⁶⁶

Second, the court alluded to the fact that § 1123(d) was enacted in § 305 of Title III (Consumer Bankruptcy Issue), the title of which is "Interest on Interest," as opposed to Title II of the Act that addresses commercial bankruptcy.¹⁶⁷ The exact language of § 1123(d), as amended, is also included

¹⁶⁰ *Id.* at 520.

¹⁶¹ *Id.* at 522.

¹⁶² *Id.* at 521.

¹⁶³ *Id.*

¹⁶⁴ *Id.* (citation omitted).

¹⁶⁵ *Id.* at 521–22.

¹⁶⁶ *Id.* at 521.

¹⁶⁷ *Id.* at 521–22.

in chapters 12 and 13 of the Code. The duplication suggests that consumer bankruptcies were Congress's primary focus in amending § 1123.¹⁶⁸

Finally, the court noted the conspicuous absence of any reference to § 1124(A) in the Act.¹⁶⁹ Though Congress did include several other references to statutes throughout the Code, it did not explicitly reference § 1124. The court relied on this absence as an indication that § 1123(d) does not "legislatively overrule" *In re Entz-White*, as the creditor in that case suggested.¹⁷⁰

4. *In re Zamani*

A clear contrast from both *In re Southland Corp.* and *In re Sagamore Partners* is *In re Zamani*.¹⁷¹ The creditor in *In re Zamani* took out several secured loans, all of which called for an increase of either 5% or 5.75% interest added to the note rate should Zamani default.¹⁷² After the debtor defaulted and subsequently became current on his loan payments several times, the individual debtor filed for chapter 11 relief.¹⁷³ Because the debt was oversecured, the creditor was entitled to receive interest on its claims. The creditor argued that such interest should be calculated at the default rate (5.75% plus the pre-default interest rate—a total difference of \$297,000).¹⁷⁴ The debtor's proposed reorganization plan did not require interest payments at the higher default rate.¹⁷⁵

The opinion posited three main arguments. First, the court concluded that § 1123(d) did not overrule the precedent of *In re Entz-White*.¹⁷⁶

This limited and prescriptive purpose is supported by the fact that the language that became section 1123(d) was included as section 305 (entitled "Interest on Interest") in Title III of Reform Act—that portion of the statute addressing issues in consumer bankruptcy cases as opposed to Title II, the portion of the statute addressing issues in commercial bankruptcy cases.

Id.

¹⁶⁸ Bankruptcy Reform Act of 1994, 1994 Enacted H.R. 5116, 103 Enacted H.R. 5116, 108 Stat. 4106, 4134; *In re Phx. Bus. Park Ltd.*, 257 B.R. at 522.

¹⁶⁹ 11 U.S.C. 1123(d) (2012); *In re Phx. Bus. Park Ltd.*, 257 B.R. at 520–22.

¹⁷⁰ *In re Phx. Bus. Park Ltd.*, 257 B.R. at 522.

¹⁷¹ 390 B.R. 680 (Bankr. N.D. Cal. 2008).

¹⁷² *Id.* at 684.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 685.

¹⁷⁵ *Id.* at 684.

¹⁷⁶ *Id.* at 686.

Second, the bankruptcy court acknowledged and appeared to adopt another bankruptcy court's opinion that held the legislative history of § 1123(d) compelled a finding that post-default interest is not required for a cure.¹⁷⁷

Third, the court reasoned that because the contract lacked a provision specifically addressing the way in which a "cure" should be calculated, no contractual provision required use of the higher default rate.¹⁷⁸ In other words, the court treated the lack of contractual language referencing "cure" as an absence of any relevant underlying provision.¹⁷⁹

5. In re Moody Nat. SHS Houston H, LLC

In *In re Moody Nat. SHS Houston H, LLC*, the debtor argued that the creditor was unimpaired under § 1124(2) because the debtor's plan cured the \$14,431,000 note.¹⁸⁰ The debtor borrowed \$14,431,000 with a contractual default interest rate of 5% above the regular interest rate.¹⁸¹ After defaulting, the debtor sought to cure the default and reinstate the loan pursuant to a reorganization plan.¹⁸² The debtor claimed that: (1) § 1124(2) provides substantive relief from the requirement to pay default interest, (2) § 365(b)(2) provides an exception because the default interest rate is a penalty, and (3) legislative history renders § 1123(d) inapplicable in a determination about impairment.¹⁸³ The bankruptcy court disagreed with the debtor on all three fronts.

The court's opinion relied heavily on dicta from *In re Southland Corp.*¹⁸⁴ First, the court held that the debtor's argument provided a "circular"

¹⁷⁷ *Id.*

¹⁷⁸ *See id.* at 687 (stating "[b]ecause there is no contractual provision requiring the use of the higher default interest rate for purposes of calculating a cure amount, looking to the underlying contract as directed by § 1123(d) does not, in this case, prohibit the debtor's use of the basic contract rate of interest in curing his debt").

¹⁷⁹ *In re Zamani*, 390 B.R. 680, 687 (Bankr. N.D. Cal. 2008) (stating "[b]ecause there is no contractual provision requiring the use of the higher default interest rate for purposes of calculating a cure amount, looking to the underlying contract as directed by § 1123(d) does not, in this case, prohibit the debtor's use of the basic contract rate of interest in curing his debt").

¹⁸⁰ 426 B.R. 667, 672 (Bankr. S.D. Tex. 2010).

¹⁸¹ *Id.* at 677.

¹⁸² *Id.* at 669.

¹⁸³ *Id.* at 673.

¹⁸⁴ *See id.* (quoting *In re Southland Corp.*, 160 F.3d 1054, 1059 n.6 (5th Cir. 1998)). Largely conforming to Judge Jones's criticisms of *In re Entz-White*, the court in *In re Moody* also criticizes the *Entz-White* opinion for "not giv[ing] proper recognition to the relationships that exist between §§ 1123, 1124, 1126 and 1129 of the Bankruptcy Code." *Id.* at 672.

definition.¹⁸⁵ By arguing that § 1124 does not require or mandate payment of default-rate interest, the debtor stretched the scope of § 1124 “beyond its plain meaning.”¹⁸⁶ Second, the court was unable to locate any precedent supporting the debtor’s position that § 365(b)(2) exempts a debtor from paying default rate interest because of its penalty provision.¹⁸⁷

Moreover, the debtor reasoned that the statute as written was unambiguous and thus excluded any consideration of legislative history.¹⁸⁸ The court not only rejected the debtor’s legislative history argument, it also suggested that legislative history cuts against its argument.¹⁸⁹ The court provided no evidence of legislative history to support its claim that it “hurts” the debtor’s position except for the fact that Congress enacted the Act.¹⁹⁰

The disagreement in *In re Moody* concerns “cure” for the purposes of impairment in § 1124(2). Prior to the 1994 amendments, however, courts utilized § 1124 as a way to fashion a definition of “cure” under § 1123. What is more, the decision in *In re Moody* appears to suggest the provision added to § 1123(d) by the Act has meaningful implications for the purposes of construing § 1124(2)(A).

¹⁸⁵ *Id.* at 672.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 674–75.

¹⁸⁸ *Id.* at 674 (citing *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229 (2010); *Whitfield v. U.S.*, 543 U.S. 209, 215–16 (2005)).

¹⁸⁹ *Id.*

The legislative history [of 11 U.S.C. 1123(d)] *hurts* rather than helps *Moody*’s position. Of course, the particular issue before the Supreme Court in *Rake* concerned home mortgages. But, the Congressional repair to *Rake* solved the issue by a broader declaration—*Thou shall look to state law when determining cure amounts*. Congress did not limit the cure to the narrow problem that *Rake* created. Congress could have simply amended § 1322 of the Bankruptcy Code. Instead, Congress determined that all cures (including the one faced by *Moody*) should be determined in accordance with state law and the underlying agreement.

Id. Research has failed to locate other court’s viewing legislative history similar to the way in which the court views it in *In re Moody*.

¹⁹⁰ *See id.* In fact, the portion of the judge’s opinion discussing how legislative history undercuts the creditor’s argument is completely void of any reference to committee reports, floor transcript, signing statements, etc. The judge bases his somewhat novel but absolutely unique theory on the basis that because congress chose to amend the state (i.e., chose to pass the Act) that in and of itself constituted legislative history warranting a decision favorable to the creditors. His theory, taken to its logical conclusion, implies the presence of the text itself is legislative history. Not only does Judge Isgur criticize the use of legislative history, he also astonishingly incorporates textualism into a legislative history analysis. *Id.*

6. In re Sweet

In re Sweet offers an example from a Tenth Circuit bankruptcy court. Debtors borrowed \$498,195 from creditors to be repaid with interest at a minimum rate of 8.75% and a maximum rate of 16.75%, except that—in the event of default—the interest rate would increase to 21%.¹⁹¹ In a post-confirmation hearing to determine the value of the creditor’s claim, the debtor argued that the interest on the outstanding obligations should be calculated at the pre-default rate.¹⁹² The creditors disagreed and contended that § 1123(d) unambiguously required that default-rate interest be paid for the debtor’s default to be “cured.”¹⁹³ The court noted the absence of a provision permitting the borrower to cure the default in the parties’ underlying agreement.¹⁹⁴ Upon examination of applicable Colorado law, the court located no relevant statutes (i.e., “applicable nonbankruptcy law”) on-point to inform the outcome of the case.¹⁹⁵

The court seemed to accept, *arguendo*, that *In re Entz-White* remained good law; and it engaged in a discussion somewhat similar to the one proffered by the court in *In re Phoenix*, exploring whether the default interest constituted a penalty.¹⁹⁶ The parties prevented the court from entertaining whether the additional 12.25% interest because of default was a penalty because the parties stipulated that 21% was reasonable.¹⁹⁷ The court, however, ultimately allowed default-rate interest to apply, but it left unanswered the question of whether it might have ruled differently had the debtor raised the notion of penalty.

The previous cases offer an instructive guide on the judiciary’s reaction to the Act. Each of the five cases discussed above illustrates the considerations and differing results courts reached when forced to grapple with how default-rate interest impacts the consideration of cure. An analysis—considering all these cases together—follows.

¹⁹¹ 369 B.R. 644, 647 (Bankr. D. Colo. 2007).

¹⁹² *Id.* at 648.

¹⁹³ *Id.* at 649.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 649–50; *see* 11 U.S.C. § 1123(d) (2012).

¹⁹⁶ *In re Sweet*, 369 B.R. at 650.

¹⁹⁷ *Id.* at 650–51.

III. ANALYSIS

The Eleventh Circuit's decision in *In re Sagamore Partners* minimizes the historical impetus for the Act, thereby thwarting Congress's efforts and intent. The Ninth Circuit's decision acknowledges that Congress did not explicitly intend to create this situation but proceeds to disregard Congress's intention in reaching its holding.¹⁹⁸ By beginning and concluding with the "plain language," the Eleventh Circuit fails to adequately explore the outcome and anticipate the larger implications that this case might have on other debtors. A discussion follows about why the Eleventh Circuit's stringent interpretation of the Code is not only less preferable for practical purposes, but also clearly contrary to congressional intent.

This section will argue the Eleventh Circuit's opinion produces four detrimental results: (1) obstructs the overarching goal of chapter 11; (2) conflicts with Congress's intent behind the language; (3) has the potential to unnecessarily harm undersecured creditors; and (4) creates an inconsonant definition of the same word within the same chapter, denying courts the ability to treat "cure" in §§ 1123 and 1124 interchangeably, arguably creating two different definitions of the same word.

A. Ninth Circuit Precedent Is Preferable to the Recent Eleventh Circuit Case

1. The Eleventh Circuit's Opinion Obstructs the Primary Goal of Chapter 11

The Eleventh Circuit's interpretation—mandating default-rate interest in order to cure a claim—frustrates the premise and goal of chapter 11: successful rehabilitation of the debtor business.¹⁹⁹ As in *In re Sagamore Partners*, default interest can oftentimes amount to quite substantial sums.²⁰⁰ In that case, for example, a total of \$5,416,250.00 had accrued in default interest. By requiring default interest, and by applying the holding in this case to other cases in which

¹⁹⁸ *In re New Invs., Inc.*, 840 F.3d 1137, 1141 (9th Cir. 2016) ("The fact that Congress had a particular purpose in mind when enacting a statute does not limit the effect of the statute's text . . .").

¹⁹⁹ *In re Colortex Indus.*, 19 F.3d 1371, 1377 (11th Cir. 1994); see also Bussel, *supra* note 9, at 946 ("Analysis of random bankruptcy cases indicates that pragmatic interpretive methods continue to be the norm in the bankruptcy field.").

²⁰⁰ See, e.g., *In re Sylmar Plaza, L.P.*, 314 F.3d 1070, 1073 (9th Cir. 2002); *In re Sagamore Partners, Ltd.*, 512 B.R. 296, 302 (S.D. Fla. 2014), *aff'd in part, rev'd in part and remanded sub nom. JPMCC 2006-LDP7 Miami Beach Lodging, LLC v. Sagamore Partners, Ltd. (In re Sagamore Partners, Ltd.)*, 620 F. App'x 864 (11th Cir. 2015).

more than one creditor is in a class, the plan of helping a debtor regain its footing, become profitable again, and start making payments to creditors could be frustrated. If the intent of the Act is to assist businesses in becoming profitable again for the mutual sake of both creditors and the public, then requiring sometimes exorbitant “interest on interest” frustrates that goal.

Additionally, few instances likely exist where a debtor filed for bankruptcy and did not default on a promise. If the intent of curing a default is to place debtors and creditors in positions they would have been in had the default not occurred, it would not require using default-rate interest. Thus, the language of the Code is superfluous. One might imagine a scenario where a debtor files for bankruptcy prior to defaulting, but those scenarios are unlikely, especially when the debtor is required to make monthly payments, such as the debtor in *In re Sagamore Partners*.²⁰¹

2. Principles of Interpretation in the Bankruptcy Context

Courts have crafted bankruptcy-specific statutory construction principles. One principle holds, “When Congress amend[ed] the bankruptcy law, it d[id] not write on a clean slate.”²⁰² Another principle applies when a pre-Code practice exists. “Furthermore, th[e] Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history.”²⁰³

Ostensibly, Congress knew of the Second and Ninth Circuits’ interpretations of what it means to cure a claim. The Ninth Circuit fashioned its definition in 1988, and the Second Circuit did so even earlier in 1982. The Fifth Circuit appears to be alone in interpreting “cure” to include default-rate interest because it decided the issue after the Act’s passage.²⁰⁴ What is clear is that circuits were developing an exceptionally similar and consonant concept of cure without congressional interference. Now, after Congress has inserted

²⁰¹ *In re Sagamore Partners, Ltd.*, 512 B.R. at 301.

²⁰² *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (quoting *Emil v. Hanley*, 318 U.S. 515, 521 (1943)) (quotation marks omitted).

²⁰³ *Id.* (citing *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 377 (1988)). Pre-Code behavior is also used to interpret “gaps in the express coverage of the Code . . .” *Id.* at 433 (Scalia, J., dissenting).

²⁰⁴ *In re Southland Corp.*, 160 F.3d 1059 (5th Cir. 1998).

itself into the debate (perhaps inadvertently), courts have overturned their previously established precedents with little discussion of congressional intent.

Instead of creating the amendment to overrule the circuits' interpretations, Congress sought to overrule an anti-debtor Supreme Court case—*Rake*.²⁰⁵ Had Congress intended to override the jurisprudence of the respective circuits, one would understandably expect Congress to at least make reference, even if passing, to that intent. In other words, the Act worked as a ceiling (preventing unbargained higher rates of interest), not a floor (demanding bargained-for interest). Tension exists because courts construct the Act to apply in scenarios that Congress did not anticipate or intend.

One could argue that the Ninth Circuit's pre-*In re New Investments* interpretation of § 1123(d) and its definition of "cure" are consistent with the plain language of § 123(d). If "cure," as both the Second and Ninth Circuits have previously stated, means to return the parties to the position they were in before the default, then the contractual obligation of paying debt excluding the default rate would be in accordance with any underlying agreement. Obviously, in circuits such as the Fifth Circuit, which has tangentially ruled that cure places the parties in the positions they were in prebankruptcy, this argument cannot pass muster. But, in circuits that have not addressed this issue, or in circuits in which "cure" was implied to place the parties in their pre-default positions, this argument is both salient and sound.

The Ninth Circuit's precedent pre-*In re New Investments* conforms to Congress's intent. Contrary to the bankruptcy court's opinion in *In re Moody*, no congressional history remotely suggests Congress intended the Act to make default-rate interest (i.e., "interest upon interest") necessary to effectuate a cure. But, to even consider legislative history, the language must be unambiguous, something the Fifth and Eleventh Circuits fail to acknowledge.²⁰⁶ Even other courts ruling for creditors concede the amendments were "not very clear."²⁰⁷ Perhaps if the courts acknowledged ambiguity, a complete and extensive assessment of legislative intent and history would shed additional light on this observably divisive subject.

²⁰⁵ H.R. Rep. 103-835, 55, 1994 U.S.C.C.A.N. 3340, 3364.

²⁰⁶ See *Dewsnup*, 502 U.S. at 419.

²⁰⁷ See, e.g., *In re 1 Ashbury Ct. Partners, L.L.C.*, No. 11-10131, 2011 Bankr. LEXIS 3922, at *17 (U.S. Bankr. D. Kan. Oct. 5, 2011); see also *In re Sweet*, 369 B.R. 644, 650 (Bankr. D. Colo. 2007) (concluding *In re Entz-White* was not overruled by § 1123(d) under the circumstances of this case).

In fact, the court in *In re Moody* held that the legislative history of § 1123(d) undercut a debtor's argument that the Act's language rings hollow.²⁰⁸ The court asserted that by including the exact language in several different sections of the Code, Congress intended to impose such a reading as the one reached in *In re Moody*. By the same token, if Congress intended to apply the definition of § 1123(d), it could have done so where one might expect: in the definition section.²⁰⁹ By enacting the definition of "cure" in § 1123 and not in §§ 1124 or 101, Congress did not remedy the issue of what constitutes a cure for the purposes of what is an impaired claim.

The court went on to state that Congress resolved *Rake* by a broader definition "[t]hou shall look to state law when determining cure amounts."²¹⁰ But Congress's actual language required courts and parties to look to "nonbankruptcy," not state, law.²¹¹ As the court astutely noted in *In re Sweet*, what if the contract fails to mention anything relating to default-rate interest for the purposes of a cure?²¹² Are courts to assume if default-rate interest is called for that it should persist into reorganization? That appears to be the approach taken by the Fifth and Eleventh Circuits, but perhaps, as the United States Bankruptcy Court for the District of Colorado noted, that assumption should itself be the question.²¹³ If no provision relates to default-rate interest for the purpose of cure, why should courts conclude, even in its absence, that such a rate is required?

As this Comment has shown, default-rate interest regularly accrues to exorbitant amounts. Whether it was the \$297,000 of unpaid default interest in *In re Zamini*,²¹⁴ the \$1 million (an additional 5% interest) in *In re Sylmar Plaza*,²¹⁵ or the \$5,416,250.00 in *In re Sagamore Partners*,²¹⁶ each of these amounts demonstrate that the difference between default and non-default-rate

²⁰⁸ *In re Moody Nat'l SHS Houston H, LLC*, 426 B.R. 667, 674 (Bankr. S.D. Tex. 2010); *see also id.* at 676 n.5.

²⁰⁹ *See* 11 U.S.C. § 101 (2012).

²¹⁰ *In re Moody Nat'l SHS Hous. H, LLC*, 426 B.R. at 674.

²¹¹ 11 U.S.C. § 1123(d).

²¹² *In re Sweet*, 369 B.R. 644, 650 (Bankr. D. Colo. 2007).

²¹³ *In re Sweet*, 369 B.R. 644 (Bankr. D. Colo. 2007).

²¹⁴ 390 B.R. 680, 685 (Bankr. N.D. Cal. 2008).

²¹⁵ 314 F.3d 1070, 1073 (9th Cir. 2002).

²¹⁶ 512 B.R. 296, 302 (S.D. Fla. 2014), *aff'd in part, rev'd in part and remanded sub nom.* JPMCC 2006-LDP7 Miami Beach Lodging, LLC v. Sagamore Partners, Ltd. (*In re Sagamore Partners, Ltd.*), 620 F. App'x 864 (11th Cir. 2015).

interest can be significant. For instance, the unpaid default interest in *JPMCC* constitutes approximately 17% of the *entire* note.²¹⁷

3. *The Eleventh Circuit's Opinion Creates Unnecessary Tension*

The Eleventh Circuit in *In re Sagamore Partners* acknowledged the “tension” in the panel’s interpretation created within the Code. “Thus, under § 1124, any outstanding default-rate interest is ignored when determining whether a claim to a loan is impaired, but . . . under § 1123, outstanding default-rate interest, if called for in the underlying agreement, precludes reinstating the original terms of the loan.”²¹⁸ The disparity allows a reorganization plan that does not include default-rate interest to be accepted by a creditor while precluding that same plan from reinstatement.²¹⁹ The Eleventh Circuit, in acknowledging the tension, cited to a bankruptcy court case from Texas, *In re Moody*.²²⁰ As previously discussed, the Fifth Circuit already held the meaning of “cure” is not interchangeable within the Code even before the Act’s implementation.²²¹ The Eleventh Circuit accepted the same notion that “cure” is not to be read to mean the same in § 1123 as it is in § 1124.²²² However, the case to which the Eleventh Circuit cites, *In re Moody*, appears to apply its analysis of a § 1123 cure the same way it would apply “cure” under § 1124.²²³

²¹⁷ The original loan was \$31.5 million dollars. *Id.* at 301.

²¹⁸ *In re Sagamore Partners, Ltd.*, 620 F. App’x 864, 869 (11th Cir. 2015).

²¹⁹ *See id.*

²²⁰ *Id.* (quoting *In re Moody Nat. SHS Houston H, LLC*, 426 B.R. 667, 676 n.5 (Bankr. S.D. Tex. 2010)).

²²¹ *See In re Southland Corp.*, 160 F.3d 1054, 1059 (5th Cir. 1998) (“No part of the Code compels the inference of cure.”).

²²² *In re Sagamore Partners, Ltd.*, 620 F. App’x at 869 (quoting *In re Moody Nat. SHS Houston H, LLC*, 426 B.R. 667, 676 n.5 (Bankr. S.D. Tex. 2010)).

²²³ *See In re Moody Nat. SHS Houston H, LLC*, 426 B.R. at 676 n.5 (holding both the prepetition cure amount and the post-petition cure amounts cannot be read to on a “different basis”). In a footnote, the court

recognized the tension between a claim-based evaluation of lack of impairment and the application of § 1123(d) to post-petition amounts that are required to effect a cure. Among other things, this tension demonstrates that the Bankruptcy Code does not precisely equate curing a default with unimpairment of a claim. Nevertheless, the Court does not believe that the statute can be read to determine pre-petition cure amounts on a different basis than post-petition cure amounts. Both must be determined “in accordance with the underlying agreement and applicable nonbankruptcy law.”

Id. (quoting 11 U.S.C. § 1123(d) (2012)).

The creditor in *In re Southland* attempted to argue “cure” was fungible throughout the Code.²²⁴ The Eleventh Circuit, in identifying the “tension,” added credence to the creditor’s argument.²²⁵ Even Justice Scalia, in a 1992 Supreme Court case in which statutory construction of the Code was at issue, railed against what he called a “one-subsection-at-a-time approach to statutory exegesis.”²²⁶ Because the Eleventh Circuit both acknowledged the “tension”²²⁷ and proceeded to casually dismiss the issue as the “Code not precisely equat[ing] curing a default for the purposes of reinstating a loan with unimpairment of a claim,”²²⁸ courts should look beyond plain language. The court’s decision to accept at least some modicum of ambiguity allowed it to look beyond the Code and examine the intent of the legislature. Such an analysis would, as has been demonstrated, clearly signify Congress did not intend to force debtors to pay interest upon interest.

But the tension need not exist, for if the Eleventh Circuit’s decision stands, there may be one understanding of “cure” for § 1123(d) and another understanding for the purposes of impairment under § 1124. A party creditor may be unimpaired even though the plan does not call for interest at the default rate, but the plan might simultaneously contravene § 1123(d).

Ninth Circuit decisions pre-*In re New Investments* do not leave such a noticeable tension. Instead, the Ninth Circuit interpreted chapter 11 cure *in pari materia*. Had Congress intended for the term to be applicable throughout the Code, it would have included “cure” as a set definition, not as an amendment inserted in three separate chapters. Congress’s decision to do so created the present confusion in the Eleventh Circuit. What seems to be present in this disparity is Congress sought to correct what it perceived to be either an unjust or incorrect decision by the Court in *Rake*. In passing the statute as it did, however, Congress was unartful at best and overly broad at worst.

As one law review article explained, “[i]nadvertent overruling underscores . . . that statutory overruling is a risky and uncertain business.”²²⁹

²²⁴ Other circuits agree. See, e.g., *In re Taddeo*, 685 F.2d 24, 25 (2d Cir. 1982) (“In short, ‘curing a default’ in Chapter 11 means the same thing as it does in Chapters 7 or 13: the event of default is remedied and the consequences are nullified.”).

²²⁵ *In re Sagamore Partners, Ltd.*, 620 F. App’x at 869.

²²⁶ *Dewsnup v. Timm*, 502 U.S. 410, 423 (1992) (Scalia, J., dissenting).

²²⁷ *In re Sagamore Partners, Ltd.*, 620 F. App’x at 869.

²²⁸ *Id.* (quoting *In re Moody Nat’l SHS Houston H, LLC*, 426 B.R. 667, 676 n. 5 (Bankr. S.D.Tex. 2010)).

²²⁹ Bussel, *supra* note 9, at 946. It is also a plausible that a statutory construction contrary to Congress’s intent might well be overruled. In that same law review article, the author conducted a study in which he found congressionally “overruled decisions were disproportionately based on textualist reasoning in the courts.”

An “uncertain business,” that deserves a thorough and complete examination of the legislative history, impetuses, and motivations of the congressional action. By sticking one’s head in the sand, the Eleventh Circuit’s decision leaves the definition of “cure” to mean one thing in § 1123 and a different thing in § 1124.

IV. A HYBRID PROPOSAL

A. *Alternatives and a Proposal*

Adopting the Ninth Circuit’s precedent pre-*Pacifica* does not necessarily preclude a creditor from receiving default-rate interest to be considered cured. For instance, any court would be hard-pressed to deny default interest to a creditor where the language of the loan, note, or contract explicitly stated default interest must be paid for the creditor to be cured in a reorganization scenario.²³⁰ At least one prominent firm, Jones Day, following *JMPCC*, advised clients to be “clear and consistent in enforcing their post-default rights”²³¹

While that approach, of course, would require an explicit provision about bankruptcy reorganization, a creditor would be well-served in including this language. And in doing so, the creditor would deny the debtor the argument that the creditor received a windfall as a result. As the Bankruptcy Court for the Northern District of California proffered, allowing a debtor to avoid paying default-rate interest to effectuate a cure may comply with the “underlying agreement” if the contract is void of any provision requiring default-rate interest for purposes of calculating a cure.²³² Because “curing,” according to the Ninth Circuit, continues to mean returning parties to their positions prior to *default*, such an interpretation “accord[s]” with the “underlying agreement.”²³³ This rendition would encounter resistance in the Fifth Circuit, which has held

Bussel, *supra* note 9, at 908–10; *see also* Robert M. Lawless, *Legisprudence Through a Bankruptcy Lens: A Study in the Supreme Court’s Bankruptcy Cases*, 47 SYRACUSE L. REV. 1, 118 (1996) (arguing textualism is not the proper approach to interpreting the Code).

²³⁰ *Eleventh Circuit Weighs In on Section 1123(d): Reinstatement of Defaulted Loan Agreement Under Chapter 11 Plan Requires Payment of Default-Rate Interest*, JONES DAY, http://www.jonesday.com/Eleventh-Circuit-Weighs-In-on-Section-1123d-Reinstatement-of-Defaulted-Loan-Agreement-Under-Chapter-11-Plan-Requires-Payment-of-Default-Rate-Interest-11-17-2015/?RSS=true?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration (last visited January 13, 2016).

²³¹ *Id.*

²³² *In re Zamani*, 390 B.R. 680, 686 (Bankr. N.D. Cal. 2008).

²³³ 11 U.S.C. § 1123(d) (2012).

that “curing” refers to placing parties in their positions prebankruptcy, not pre-default.²³⁴

Moreover, should a state statute provide that default-rate interest is due in the instance of chapter 11 cures, this situation would also pose challenges for debtors seeking to evade payment of default-rate interest. A second option available to states inclined to preserve a debtor’s power would be to amend their respective laws to prevent creditors from collecting default-rate interest to conform with § 1123(d). The second option seems to be an implicit alternative Judge Isgur offers in *In re Moody*.²³⁵ A state law preventing such an occurrence would conceivably preempt bankruptcy courts from requiring the default-rate interest. At least one state has expressly granted creditors the option to collect interest on interest in certain cases.²³⁶

According to one survey, Congress overruled 54% of cases in which the courts used a textualist or primarily textualist interpretation of the Code,²³⁷ and it can do so here.²³⁸ Congress can clarify what constitutes a cure in one of three ways. First, Congress could define “cure” in § 101, the Code’s definition section. This addition would render “cure” a fungible term throughout the Code, including chapter 13. Second, Congress could add an additional provision to § 1124 specifying what “cure” means for the purposes of impairment.

The first two options, at the very least, would remove any tension or inconsistency. If Congress deems it necessary to define cure in a different manner for the purposes of what constitutes a cured claim for impairment versus contents of a plan, Congress could simply insert the language from § 1123(d) into § 1124 entirely.

Finally, and what this author suggests, Congress should remove § 1123(d) and replace it with a more precise definition of “cure” that would return the parties to their positions pre-default. Doing so would also restore the definition several courts, save for the Fifth Circuit, adopted before Congress’s amendment.

²³⁴ *In re Southland Corp.*, 160 F.3d 1054, 1059 (5th Cir. 1998).

²³⁵ *In re Moody Nat’l SHS Houston H, LLC*, 426 B.R. 667, 674 (Bankr. S.D. Tex. 2010).

²³⁶ 1995 GA. LAWS 432 (S.B. No. 408).

²³⁷ Bussel, *supra* note 9, at 909 (table 1).

²³⁸ *But see* Lawless, *supra* note 229, at 119 (“[I]nterest-group politics make congressional action infrequent and incomplete.”).

CONCLUSION

When clear language is present, courts must afford such language great weight and not take it lightly. But, an analysis that distorts Congress's intent, while relying solely upon the perceived plain language, does not further public interest and does a disservice to parties in bankruptcy. The path the Eleventh Circuit took is eerily similar to how one commentator described the Supreme Court's action in another bankruptcy case involving textual interpretation: "If the text alone seems to us to give [the authority], in settling the law on this point, we will not weigh any considerations based on history, bankruptcy policy and administration, or extrinsic evidence of what Congress really intended."²³⁹

If parties are to be returned to their pre-default status, which is what many circuits determined cure to mean, then ostensibly default-rate interest would not be absolute under the statutory language itself. That exact problem is an example of the strictly textualist approach's pitfall in the bankruptcy context. As the court in *In re Sweet* noted, the absence of state legislation combined with an unclear underlying agreement, leaves us back where we started: an ambiguous statute within the Code deserving of full analysis.

The precedent of the Ninth Circuit pre-*Pacifica* is preferable to the Eleventh Circuit's approach. The Ninth Circuit's approach promotes the primary goal of chapter 11, would not unnecessarily harm undersecured creditors, and does not create "tension" within the Code. Lastly, an understanding that "cure" places the parties in the same position they were pre-default does not foreclose upon a creditor's rights unless the language in the contract or agreement explicitly calls for default-rate interest for the purposes of "cure" and the agreement does not contravene Code principles established in

²³⁹ Bussel, *supra* note 9, at 897. The author, Daniel J. Bussel, was even more blistering later in the article. *See id.* (writing "agnostic stance with respect to the practical consequences, purpose, and efficacy of a particular construction is an essential characteristic of textualism. Textualists do not deny their agnosticism"). The Eleventh Circuit was similarly agnostic in *In re Sagamore Partners* by refusing to even discuss, much less give credence to, the legislative history surrounding the Act's passage. *In re Sagamore Partners, Ltd.*, 620 F. App'x 864, 869 (11th Cir. 2015) (quoting *United States v. Gonzales*, 520 U.S. 1, 6 (1997)) ("Given this 'straightforward statutory command' in § 1123(d), 'there is no reason to resort to legislative history.'").

the courts, such as the prohibition against collecting both fees and default interest.

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